

Dec 27, 2017

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MENSONIDES DAIRY, LLC, a  
Washington State limited liability  
company,

Plaintiff,

v.

AGRI-KING NUTRITION, INC., an  
Illinois State corporation, and AGRI-  
KING, INC., an Illinois corporation,  
Defendants.

NO. 1:16-cv-03067-SAB

**ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANTS' MOTION FOR  
PARTIAL SUMMARY  
JUDGMENT**

On December 19, 2017, the Court held a motion hearing on Defendants' Motion for Partial Summary Judgment, ECF No. 96; and Plaintiff's Motion Allowing/Clarifying Expert Testimony, ECF No. 104. Tom Scribner appeared on behalf of Plaintiff, and Thomas Stone appeared on behalf of Defendants.

After careful consideration of the parties' briefings and presentation, the Court grants in part and denies in part Defendants' Motion for Partial Summary Judgment, ECF No. 96. The Court dismisses Plaintiff's common law negligence claim because it is preempted by the Washington Products Liability Act ("WPLA"), and dismisses Plaintiff's WPLA claim because Plaintiff's alleged harm is purely economic. As a result, the WPLA's economic loss exclusion applies and Plaintiff is left to seek relief under the Uniform Commercial Code.

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1 The Court denies Defendants' Motion for Summary Judgment with respect  
2 to Plaintiff's breach of warranty claim because the motion does not challenge a  
3 claim Plaintiff is making.

4 Finally, the Court reserves ruling on Plaintiff's Motion Allowing/Clarifying  
5 Expert Testimony, ECF No. 104, until the time of trial. The parties are invited to  
6 renew the motion at that time.

### 7 **FACTS<sup>1</sup>**

8 Defendants manufacture and sell multi-purpose forage treatment products  
9 for livestock feed. Pertinent to this case is one of Defendants' original products,  
10 Silo-King. Silo-King is a silage<sup>2</sup> additive that purportedly improves the quality of  
11 corn silage fed to dairy cows. Plaintiff has used this product to treat its silage since  
12 2009, however, this case concerns only the corn silage treated with Silo-King in  
13 2014.

14 Plaintiff filed this action in 2016, alleging Silo-King failed to provide an  
15 adequate number of lactic acid-producing bacteria, commonly referred to as  
16 Colony Forming Units ("CFU"), to result in successful fermentation of the corn  
17 silage. According to Plaintiff, Silo-King caused the 2014 corn silage to go "bad,"<sup>3</sup>  
18 resulting in the dairy cows eating less; thereby reducing daily milk production and  
19 compromising the health and reproduction of the cattle.

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21 <sup>1</sup> Defendants failed to follow the Local Rules governing motions for summary  
22 judgment. Pursuant the LR 56.1, Defendants were required to file, separately from  
23 the memorandum of law, a statement of undisputed facts.

24 <sup>2</sup> "Silage" is plant matter (often corn, triticale, or hay) that is ensiled, allowed to  
25 ferment over a period of months, and then used as animal feed. ECF No. 57 at 2,  
26 n.1.

27 <sup>3</sup> The term "bad" is used by Plaintiff's experts to describe the corn silage as not  
28 palatable.

1 **STANDARD**

2 Summary judgment is appropriate if the record establishes “no genuine  
3 dispute as to any material fact and the movant is entitled to judgment as a matter of  
4 law.” Fed. R. Civ. P. 56(a). The non-moving party must point to specific facts  
5 establishing a genuine dispute of material fact for trial. *Celotex Corp. v. Catrett*,  
6 477 U.S. 317, 324 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475  
7 U.S. 574, 586-87 (1986). There is no genuine issue for trial unless there is  
8 sufficient evidence favoring the nonmoving party for a jury to return a verdict in  
9 that party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). If  
10 the non-moving party fails to show a genuine dispute of material fact as to the  
11 elements essential to its case for which it bears the burden of proof, such that the  
12 moving party is entitled to judgment as a matter of law, the trial court must grant  
13 the summary judgment motion. *Celotex Corp.*, 477 U.S. at 322.

14 **DISCUSSION**

15 The Court exercises diversity jurisdiction pursuant to 28 U.S.C. § 1332 and  
16 therefore applies Washington State substantive law. *Erie R.Co. v. Tompkins*, 304  
17 U.S. 64, 79 (1938).

18 Plaintiff’s action against Defendants is based on three theories of liability:  
19 (1) negligence; (2) strict liability under the WPLA, RCW 7.72; and (3) breach of  
20 warranty.

21 Defendants’ Motion for Partial Summary Judgment requests the Court  
22 dismiss Plaintiff’s common law negligence claim because it is subsumed as a  
23 matter of law under the WPLA; dismiss Plaintiff’s WPLA claim because it falls  
24 under the statute’s “economic loss” exclusion; and dismiss Plaintiff’s claims for  
25 consequential damages for breach of warranty because there is no evidence that  
26 the alleged breach of warranty was a proximate cause of such damages.

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## Plaintiff's Negligence Claim

Defendants argue Plaintiff's common law negligence claim must be dismissed because it is preempted by the WPLA. The WPLA is the exclusive remedy for product liability claims. *Potter v. Wash. State Patrol*, 165 Wash.2d 67, 87 (2008). The Washington Supreme Court has determined that "[c]lear statutory language and corroborative legislative history leave no doubt about the WPLA's preemptive purpose." *Id.* (quoting *Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wash.2d 847, 853 (1989)). The Court reasoned that allowing common law claims would defeat the purpose of WPLA and, essentially, "render[] the statute a nullity." *Wash. Water Power Co.*, 112 Wash.2d at 856.

Therefore, the WPLA supplants all common law claims or actions based on harm caused by a product. *Macias v. Saberhagen Holdings, Inc.*, 175 Wash.2d 402, 409 (2012) (citing *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 323 (1993)). Insofar as a negligence claim is product-based, the negligence theory is subsumed under the WPLA product liability claim. *Macias*, 175 Wash.2d at 409 (citing *Hue v. Farmboy Spray Co., Inc.*, 127 Wash.2d 67, 87 (1995)).

In this case, Plaintiff's common law negligence claim is based on the harm caused by Defendants' product. Plaintiff's claim is that Silo-King did not contain an adequate number of CFUs to result in the successful fermentation of corn silage. Plaintiff raises two theories<sup>4</sup> of negligence to support this claim: (1) Defendants negligently manufactured the product; and (2) the product was

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<sup>4</sup> In its responsive briefing, Plaintiff cites fraud as another theory of liability. However, Plaintiff's First Amended Complaint, ECF No. 38, does not include a cause of action for fraud. The Court will not entertain an argument based on hypothetical causes of action not included in Plaintiff's First Amended Complaint.

1 negligently handled, stored, and/or applied by Defendants' employee, Jessica  
2 Wiersma.

3 Plaintiff concedes its first theory is clearly product-based. However,  
4 Plaintiff contends its second theory involves conduct that is not product-based.  
5 Contrary to Plaintiff's assertions, a product liability claim under the WPLA covers  
6 a wide-range of conduct, including allegations of negligent handling, storing,  
7 and/or application of the relevant product. *See* RCW 7.72.010(4) ("Product  
8 liability claim includes any claim or action brought for harm caused by the  
9 manufacture, production, making, construction, fabrication, design, formula,  
10 preparation, assembly, installation, testing, warnings, instructions, marketing,  
11 packaging, storage, or labeling of the relevant product.").

12 Thus, Plaintiff's common law negligence claim, under either theory, is  
13 based on harm caused by Defendants' product. As such, it is subsumed by the  
14 WPLA. To find otherwise would defeat the purpose of the WPLA and "render[]  
15 the statute a nullity." *Wash. Water Power Co.*, 112 Wash.2d at 856.

16 There being no genuine dispute of material fact, summary judgment is  
17 granted in favor of Defendants, and Plaintiff's common law negligence claim is  
18 dismissed.

### 19 **Plaintiff's Washington Product Liability Act Claim<sup>5</sup>**

20 Defendants also request the Court dismiss Plaintiff's WPLA claim because  
21 it falls under the statute's "economic loss" exclusion. The WPLA permits a party  
22 to bring a product liability claim against the manufacturer for harm caused by the  
23 relevant product. RCW 7.72.010(4). If the harm caused by the relevant product is

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25 <sup>5</sup> Due to a fundamental misunderstanding of the applicable law, Plaintiff failed to  
26 rebut Defendants' argument for dismissal of Plaintiff's WPLA claim. As such,  
27 Plaintiff has failed to meet its burden of pointing to specific facts establishing a  
28 genuine dispute of material fact for trial. *Celotex Corp.*, 477 U.S. at 324.

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1 nothing more than pure economic loss, however, then recovery under the WPLA is  
2 precluded, and the party is left to seek redress under the Uniform Commercial  
3 Code. RCW 7.72.010(6); *Touchet Valley Grain Growers, Inc. v. Opp & Seibold*  
4 *General Const., Inc.*, 119 Wash.2d 334, 351 (1992). Washington courts refer to  
5 this as WPLA’s “economic loss” exclusion. *Id.*

6 The Washington Supreme Court has identified two tests to characterize a  
7 plaintiff’s claimed harm: (1) the sudden and dangerous test, and (2) the evaluative  
8 approach. *Id.*

9 **a. Sudden and Dangerous Test**

10 Under the sudden and dangerous test, “economic losses are distinguished from  
11 other damages principally according to the manner in which the product failure  
12 occurred. If a product’s failure is the result of a sudden and dangerous event, it is  
13 remediable in tort, if not, the product failure is deemed an economic loss.” *Staton*  
14 *Hills Winery Co., Ltd. v. Collons*, 96 Wash.App. 590, 597 n.4 (1999).

15 The following cases provide guidance on what constitutes a sudden and  
16 dangerous event. In *Touchet Valley*, a grain storage building was designed and  
17 constructed to hold approximately 1.9 million bushels of grain. 119 Wash.2d at  
18 338-39. After being properly filled to capacity, a portion of the buildings wall  
19 collapsed, causing moisture and pests to destroy the stored grain. *Id.* The  
20 Washington Supreme Court found that the sudden structural collapse constituted a  
21 “sudden and *highly* dangerous event.” *Id.* at 353 (emphasis added).

22 In *Staton Hills*, a winery purchased five steel tanks coated with food-grade  
23 epoxy in order to store Sauvignon Blanc. 96 Wash.App. at 592-93. During storage,  
24 the epoxy peeled away from the tank, mixed with the Sauvignon Blanc, and ruined  
25 the wine. *Id.* The Washington Court of Appeals concluded that the tanks’ slow  
26 failure was far from na “sudden and dangerous event.” *Id.* at 597.

27 In *Borton & Sons, Inc. v. Novazone, Inc.*, No. CV-08-3016-EFS, 2009 WL  
28 3062323 (E.D. Wash. Sept. 22, 2009), Plaintiff, a Washington company that

1 grows, stores, and ships apples, agreed to let Defendant install and operate an  
2 experimental ozone generation system in several of its apple storage facilities. *Id.*  
3 at \*1. The ozone system was designed to delay apple decay. Instead, it caused the  
4 apples to develop brown surface lesions, rendering the apples unmarketable at the  
5 retail level. *Id.* Judge Shea found the ozone generation system's failure was not a  
6 "sudden and dangerous event." *Id.* at \*3.

7 In this case, Silo-King's alleged failure does not constitute a sudden and  
8 dangerous event. Much like the steel tanks in *Staton Hills*, and the ozone  
9 generation system in *Borton & Sons*, Silo-King's alleged failure occurred over a  
10 period of months after the product was applied to the corn silage.

11 Moreover, aside from blanket assertions that Defendants manufactured a  
12 product that was not reasonably safe, Plaintiff has failed to provide any facts to  
13 show how the product's alleged failure made it dangerous. Perhaps Plaintiff may  
14 argue the product's failure placed its dairy cows in danger, however, that does not  
15 appear to be the type of danger this test is concerned with. *See, e.g., Touchet*  
16 *Valley* 119 Wash.2d at 354 ("the risk of structural collapse posed a real,  
17 nonspeculative danger of physical injury to any persons walking in or about the  
18 flathouse building. It is simply fortuitous that no persons were present when the  
19 [structure] fell to the ground."). Thus, under the sudden and dangerous test,  
20 Plaintiff's claim of harm appears to be purely economic.

## 21 **b. Evaluative Approach**

22 Under the evaluative approach, courts consider (1) the nature of the defect; (2)  
23 the type of risk; and (3) the manner in which the injury arose. *Touchet Valley*, 119  
24 Wash.2d at 353.

## 25 **i. Nature of the Defect**

26 The parties agree Plaintiff's claim is that Silo-King failed to provide enough  
27 CFUs to result in successful fermentation of the corn silage that was fed to  
28 Plaintiff's dairy cows. As a result, Plaintiff's cows ate less, thereby reducing daily

1 milk production and compromising the health and reproduction of the cattle. In  
2 other words, Defendants' product failed to work as Plaintiff believed it would.

3 The nature of the defect in this case is analogous to those in *Borton & Sons*,  
4 and *Staton Hills*, where the product at issue failed to work as planned. *Borton &*  
5 *Sons, Inc.*, No. CV-08-3016-EFS, 2009 WL 3062323 at \*1 (ozone generation  
6 system did not prevent apples from decaying); *Staton Hills*, 96 Wash.App. at 592-  
7 93 (steel tank did not preserve or maintain wine properly). This factor, therefore,  
8 implicates the bargain-expectation policies of contract law, not the safety-  
9 insurance policies of tort law. *See Staton Hills*, 96 Wash.App. at 598 (noting the  
10 difference between contract law, which focuses on enforcing expectations created  
11 by agreement, and tort law, which focuses on protecting people and property by  
12 imposing a duty of care on others). Thus, this factor weighs in favor of finding  
13 Plaintiff's claim of harm is purely economic.

#### 14 **ii. Type of Risk**

15 Two sub-components come into play under this factor: (1) the magnitude of  
16 the risk that the product posed to other people and property; and (2) whether the  
17 risks associated with the product were foreseeable. *Staton Hills*, 96 Wash.App. at  
18 598.

19 Defendants argue Silo-King did not pose a risk to other people or property;  
20 it merely did not work the way it was supposed to. Moreover, Defendants assert  
21 Plaintiff contemplated the risk associated with a product like Silo-King. Plaintiff  
22 knew the product was designed to assist fermentation and if the product failed,  
23 fermentation would not receive any boost.

24 As was the case in *Borton & Sons* and *Staton Hills*, there is no evidence to  
25 suggest Defendants' product posed any threat to humans. Plaintiff may argue the  
26 product posed a significant risk to its property; namely, its dairy cows. However,  
27 the WPLA economic loss exclusion has been applied to claims of harm to other  
28 property, such as the spoiled wine in *Staton Hills* or the apples in *Borton & Sons*.



Moreover, it is entirely foreseeable that Silo-King—a product purchased for a specific purpose—may not work as planned.

Considering the lack of threat to human life and the foreseeability of the risks associated with the product, this factor also weighs in favor of finding Plaintiff’s claim of harm as purely economic.

### **iii. Manner of Injury**

The third factor effectively mirrors the sudden and dangerous test. *Touchet Valley*, 119 Wash.2d at 354. As highlighted above, Silo-King’s alleged failure does not constitute a “sudden and dangerous event.” *Id.* at 351. Thus, this factor also weighs in favor of finding Plaintiff’s claim of harm is purely economic.

Under both tests above, Plaintiff’s claim of harm is purely economic. There being no genuine dispute of material fact, summary judgment is granted in favor of Defendants, and Plaintiff’s WPLA claim is dismissed because it falls under the WPLA’s economic loss exclusion. Plaintiff is left to seek relief under the Uniform Commercial Code.

### **Plaintiff’s Breach of Warranty Claim**

Finally, Defendants request the Court dismiss Plaintiff’s claim for consequential damages for breach of warranty on grounds that Plaintiff cannot prove the alleged breach of warranty was a proximate cause of such damages. Defendants make this argument by characterizing Plaintiff’s breach of warranty claim as that of a label guarantee claim. In response, Plaintiff clarified that its breach of warranty claim is not based on Silo-King’s alleged failure to meet the label guarantee.

While it is not clear to the Court what Plaintiff’s breach of warranty claim is, the Court cannot grant a motion challenging a claim Plaintiff does not make. Therefore, Defendants’ motion for summary judgment, as to Plaintiff’s breach of warranty claim, is denied.

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1 **CONCLUSION**

2 For the reasons set forth above, Defendants' Motion for Partial Summary  
3 Judgment, ECF No. 96, is granted in part and denied in part.

4 Accordingly, **IT IS HEREBY ORDERED:**

5 1. Defendants' Motion for Partial Summary Judgment, ECF No. 96, is  
6 **GRANTED IN PART AND DENIED IN PART.** The Court **GRANTS** summary  
7 judgment and **DISMISSES** Plaintiff's common law negligence claim, and  
8 **DISMISSES** Plaintiff's Washington Product Liability Act claim. The Court  
9 **DENIES** summary judgment with respect to Plaintiff's breach of warranty claim.

10 2. The Court **RESERVES RULING** on Plaintiff's Motion  
11 Allowing/Clarifying Expert Testimony, ECF No. 104. The parties are invited the  
12 renew the motion at time of trial. If necessary, Defendants are authorized to  
13 conduct limited additional discovery to explore the new and late expert opinions  
14 offered by Plaintiff.

15 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter  
16 this Order and to provide copies to counsel.

17 **DATED** this 27th day of December 2017.



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22 Stanley A. Bastian

23 United States District Judge  
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